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Supreme Court, U.S.
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No. 91-1450

In The

Supreme Court of the United States

October Term, 1991

KEITH ROBINSON AND J. STUART FERGUSON,

Petitioners,

v.

JAMES BRUNING,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the record sufficient to generate a disputed issue of material fact as to whether the police officers who submitted allegedly materially false affidavits violated plaintiff's constitutionally protected rights as clearly established by *Franks v. Delaware,* 438 U.S. 154 (1978)?

2. Did the Tenth Circuit correctly find that the evidence in this case was sufficient to support a jury finding that no reasonably competent police officer in the position of the defendant-police officers would have drafted and submitted the subject affidavits in the belief that they were accurate and that they established probable cause?

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I. STATEMENT OF THE CASE

Petitioners did not provide a statement of facts to the Court. Rather, they provide a vague and rambling "Statement of the Case" which contains misstatements of fact and material omissions. Respondent will recite the undisputed facts of this matter to assist the Court in fully and adequately assessing the merits of the petition.

A. STATEMENT OF FACTS

On June 17, 1986, a young woman (Victim #1) was raped in Gunnison, Colorado. Contrary to the assertions of the petitioners, the only opportunity this victim had to

observe her assailant was in the rear view mirror of her darkened vehicle shortly after she entered it at night. The assailant was hidden in the back seat with a white handkerchief over his face. The assailant immediately ordered the victim to turn off the vehicle's dome light. The victim instantly complied. This momentary encounter was the last and only opportunity the victim had to visually observe her assailant. She was wholly unable to observe any portion of the assailant's body and saw only the upper portion of his face above the handkerchief.

The victim was then ordered to drive to a secluded place where she was blindfolded and sexually assaulted. This undisputed information is contained within the recorded statement provided by the victim to Detective Sharon O'Connell of the Durango Police Department on October 7, 1986. This interview will be referred to as the "O'Connell interview."

On the evening of the rape, this victim was interviewed by Russell Locke, a member of the Gunnison Police Department. The victim could not identify her assailant in this interview. Officer Locke forgot to make a written report of this interview. Defendant Locke also failed to assure that the victim's clothing was retained as evidence. The clothes the victim was wearing at the time of the assault were therefore discarded at the hospital where she was treated.

On June 25, 1986, the victim went to the Gunnison Police Department and was interviewed by Officer Locke and the defendant Robinson. This interview will be referred to as the "Locke/Robinson" interview. It is not clear what the victim told these officers at this meeting

since again neither officer made any type of written report. Defendant Robinson claims the victim identified James Bruning as her assailant. However, Officer Locke testified in his deposition that *had* the victim identified any assailant in this interview, he would have made a written report. Specifically, Officer Locke stated:

> Q: Now, if she had given you details, would you have written them down?
>
> A: If she had made a positive identification, I believe I would have, yes.
>
> Q: Would it be fair to say that she never said she knew this was the man that raped her?
>
> A: Yes.

No individual was arrested nor was any other formal action taken by the Gunnison Police Department against any suspect in the months that followed this assault.

On September 5, 1986, a second woman was sexually assaulted in Gunnison, Colorado. This victim (Victim #2) was blindfolded throughout the assault and at no time before, during, or after, did she visually observed her assailant.

On October 7, 1986, Victim #1 gave an extensive recorded statement to Detective O'Connell ("O'Connell interview"). The O'Connell interview was a detailed description of the sexual assault that occurred on January 17, 1986. The transcription of the interview was thirty-one (31) pages. (App., *infra*, A-1.) This is the only recorded or written statement taken from Victim #1 by any law enforcement official. During this interview, the victim indicated she had been having nightmares about the

assault. When the victim was asked who the assailant was in her dreams, she answered that it was different people. She stated that she had dreamed it was her store manager at one time. At another time it was a customer in the grocery store where she worked. **At no time during the O'Connell interview of October 7, 1986, did the victim even mention James Bruning's name or identify him as her assailant.**

The victim knew the plaintiff James Bruning before she was assaulted. She had met him on a couple of occasions through James Bruning's girlfriend (now his wife), Monica Gustafson. In the O'Connell interview, the victim indicated that upon observing the assailant in the back of her vehicle, she realized she did not know who the person was. At the end of this recorded statement, Detective O'Connell acknowledged that the victim did not know who assaulted her, and the victim agreed:

> Det. O'Connell: . . . you've got a right to be scared. You're [sic] still don't know who he is.
>
> Victim: No.

(O'Connell interview, page 30.)

On October 24, 1986, the defendant Police Detective Robinson requested another statement from Victim #1. This defendant also failed to record the interview in writing or on tape. He claims to have taken no notes. After the interview, the defendant Robinson drafted an affidavit in support of an order for non-testimonial identification from the plaintiff James Bruning in connection with the two assaults. (App., *infra*, 51a.) The defendant Robinson sought an order that the plaintiff James Bruning submit to blood samples, saliva samples, voice samples,

hair samples, photographs and fingerprints. In reliance upon the representations of the defendant Robinson in his affidavit, the order was issued by a judge of the Gunnison County Court and was executed on October 27, 1986.

In the defendant Robinson's affidavit, he represented to the Court that:

1. On June 25, 1986, the victim (#1) had positively identified the plaintiff as her assailant;

2. The victim (#1) had observed the color of the plaintiff's eyes a few days after the assault;

3. The victim had stated that the plaintiff's eyes were the same color as her assailant's.

The respondent presented evidence at the trial level and at the appellate level that none of these statements were true.

Respondents also assert that the defendant Robinson intentionally and maliciously failed to include the following information in his affidavit:

1. That in the brief moment the victim was able to observe her assailant, the assailant wore a handkerchief over his face.

2. That the victim had only seen the portions of her assailant's face above the bridge of his nose.

3. That at no time during the O'Connell interview did the victim identify James Bruning as the person who assaulted her.

4. That during the O'Connell interview, the victim had indicated she could not identify who had assaulted her.

5. That during the O'Connell interview, the victim stated she did not know the person who assaulted her.

6. That during the O'Connell interview, the victim thought the man who assaulted her might be a person who worked at the Standard Gas Station in Gunnison.

7. That during the O'Connell interview, the victim stated that the man who assaulted her could not "be that big of a person. Like 5'8" is pushing it." That the plaintiff James Bruning is 5'11" and weighs 190 pounds.

8. That the victim had advised Detective O'Connell that the man who assaulted her had "icy blue eyes" and that the plaintiff James Bruning has hazel eyes.

9. That Victim #2 was blindfolded throughout her assault and could not identify her assailant.

On October 28, 1986, the defendant J. Stuart Ferguson submitted an "Affidavit for Arrest Warrant." (App., *infra*, 55a.) Despite the previous request for the non-testimonial identification studies, the defendant Ferguson did not wait until these studies had been completed to draft or submit the arrest affidavit. Only the blood sample results were returned by the time of the submission. These samples merely indicated that the plaintiff James Bruning could not be excluded from the crimes and fell within 58% of the individuals in the population who could have committed the crimes. No results from the saliva samples, voice samples, hair samples, photographs, or fingerprints

had been obtained.[1] In his arrest affidavit, the defendant Ferguson made representations to the court which were substantially similar to those made by the defendant Robinson (including a claim that Victim #1 had identified James Bruning as her assailant). The defendant Ferguson added to his affidavit a statement that he was unaware of any facts that would tend to exculpate James Bruning. Based on this affidavit, on October 28, 1986, the plaintiff James Bruning was arrested.

On October 30, 1986, Victim #1 became aware that the defendant-police officers were claiming that she had positively identified James Bruning as her assailant. On that same day, Victim #1 contacted her attorney, Michael Stern. Mr. Stern contacted Deputy District Attorney Joseph Pacyga and advised him that Victim #1 had *not* identified James Bruning. Specifically, in response to questions concerning his October 30, 1986 conversation with Mr. Stern, Deputy District Attorney Pacyga provided the following testimony:

> A: . . . I think what we were talking about and what I was talking about was the fact that she initially identified him and really no action had been taken on the fact that she identified him, and at that point in time Mike was saying to me that he had spoken to her. He hadn't gotten the impression from her that she could identify Mr.

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[1] The results of these tests later showed: (1) fingerprints taken from Victim #1's car did not match fingerprints of James Bruning; (2) fingerprints from Victim #2's dresser drawers and a metal latch did not match fingerprints of James Bruning; and (3) foreign hairs from the quilt on which Victim #2 was raped did not match James Bruning's hairs.

> Bruning as her assailant. I said, well, Keith Robinson talked to her on such and such a date and told – she told Keith Robinson that you know, he was the person who had assaulted her, and she had identified him as being the person who had assaulted her.
>
> Q: And Mr. Stern said what about that?
>
> A: He said that he had talked to her and hadn't gotten that impression that that was what had happened.

(Pacyga depo., p.89,l.23-p.90,l.11.) Victim #1's attorney then requested a meeting with district attorneys Reed Pixler and Pacyga and the defendant Ferguson. This meeting was held on October 30, 1986. In this meeting Victim #1 stated she could *not* identify James Bruning as her assailant. In this meeting, the victim told the defendants who were present:

> That there must have been some sort of misunderstanding on the part of the police or something as to what she had said because she said that she can't say it was definitely Mr. Bruning.

(Pacyga depo., p.129,l.21-24.)

Mr. Pixler testified that in this meeting, the victim also stated:

> That she wasn't going to walk into court and point out James Bruning specifically and say he was the rapist.

(Pixler depo., p.114,l.3-4.)

Similarly, the defendant Ferguson understood that:

> [Victim #1] had raised the issue that maybe we had overstated what she had to say in the police

> report and wanted to make sure that we had it correctly.

(Ferguson depo., p.123,l.9-20.)

The defendant Robinson understood that the victim wanted to meet to make clear that she was:

> Not as forceful as we were leading in our affidavits or in our reports.

(Robinson depo., p.58,l.12-16.) Defendant Robinson understood that in this meeting, the victim stated that:

> She could not positively identify him. She was less than positive that it was him, okay, but was still saying along these lines that it could still be him (or [someone] looked like him) but did not want to be put on the stand for a positive id.

(Robinson depo., p.58,l.25-p.59,l.7.)

As a consequence of this meeting, district attorney Pacyga concluded that the police affidavits did not reflect the victim's current ability to identify James Bruning.

On December 8, 1986, district attorney Pixler contacted assistant district attorney Patrick Delaney and requested that he assist district attorney Pacyga in the preliminary hearing on the Bruning matter. During the preliminary hearing, the victim testified that she had *not* identified the defendant as the rapist. Attorney Delaney concluded there was insufficient evidence to believe that probable cause existed. In fact, Attorney Delaney executed an affidavit in the present case. (App., *infra*, 60a.) In paragraph 12 of his affidavit, Attorney Delaney states:

> In my opinion, as an experienced prosecutor, I did not feel that there was sufficient evidence to

> bind the case over for trial. Moreover, had the affidavits of the police officer properly reflected the nature and extent of the [victim's] testimony, I would never have filed the case.

On January 27, 1987, after two full days of preliminary hearing, Judge Algernon Reese determined that there was not probable cause to believe that James Bruning committed the crimes in question. The charges against Mr. Bruning were dismissed. Under the Colorado rules of criminal procedure, the charges could have been, but were not, refiled in the State District Court.

B. COURSE OF PROCEEDINGS

1. The Civil Rights Claim And Immunity Defense.

The plaintiff James Bruning filed a complaint asserting claims for relief under 42 U.S.C. § 1983 against the defendants Ferguson and Locke.[2] The plaintiff's Section 1983 claims against the defendants Robinson and Ferguson are based upon the drafting and submission of their respective affidavits. Plaintiff claims that the only material evidence in the affidavits linking James Bruning

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[2] Plaintiff also filed claims against District Attorneys Pixler and Pacyga and Gunnison police officers Johnson, Keehn and Ryan. District Attorney Pixler was dismissed from the action by stipulation of the parties. At the hearing on defendants' motion for summary judgment, the plaintiff voluntarily dismissed the claims against the District Attorney's Office and police officers Johnson, Keehn, and Ryan. At this same hearing, the district court dismissed the claims against the City of Gunnison as well as District Attorney Pacyga.

to the enumerated defenses is the alleged identification of James Bruning by Victim #1. Plaintiff claims that the affidavits (which asserted a positive identification had occurred and omitted the fact that the victim had not identified James Bruning) were false as drafted and submitted and violated plaintiff's constitutionally protected rights under *Franks v. Delaware*, 438 U.S. 154 (1978). The defendants claimed qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986). The defendants filed motions for summary judgment under their qualified immunity defense.

In response to the defendants' motion, the plaintiff submitted the information developed from depositions of each of the defendants, the affidavit of district attorney Patrick Delaney, and the affidavit of Rand B. Hendrickson, a former Denver police officer and chief investigator for the District Attorney for the Second Judicial District in Denver, Colorado. (App., *infra*, 66a.) In his affidavit, Mr. Hendrickson expressed his opinion that without the claimed "positive identification" of Mr. Bruning by Victim #1, the affidavit would be insufficient to show probable cause. Mr. Hendrickson stated that the affidavit ignored the victim's statements in her interview with Detective O'Connell and that the failure of the police officers to record and act on the claimed identification made on June 25, 1986, cast doubt on the veracity of the officers' statements that such an identification had taken place. It was Mr. Hendrickson's opinion that if such an identification had been made on June 25, 1986, the failure to record the statement and act on it would constitute professional incompetence. It was also Mr. Hendrickson's opinion that no reasonably competent police officer would have submitted the affidavits in the belief that they were accurate or established probable cause.

2. The District Court's Order Denying Defendants' Motion For Summary Judgment.

In analyzing the issue, the District Court first analyzed whether the plaintiff had shown a violation of clearly established law under *Franks v. Delaware, supra.* The court recognized that it was plaintiff's contention that both officers misrepresented the identifications made by Victim #1. The court reviewed the O'Connell statement (App., *infra,* A-1) and concluded that it clearly showed that the victim did not have "an opportunity to observe the subject closely." The District Court found that a jury could find that Detective Robinson's affidavit was made with reckless disregard for the truth of the representations concerning Victim #1's ability to identify James Bruning as her assailant. The court also found that a jury could find that the affidavit was materially false. The District Court found that the Ferguson affidavit suffered from the same defects. The court found that the defendant Ferguson's denial of his awareness of exculpatory facts was a gross distortion of the information known to him. Under these facts, the court held that the plaintiff had met his burden of demonstrating evidentiary support for a violation of a clearly established law by the defendants in submitting false affidavits.

The court then considered whether the evidence could overcome the defendants' assertion of qualified immunity under the *Malley v. Briggs, supra,* standard. The court expressly recognized that the question must be resolved under the "totality of circumstances." In reviewing the circumstances, the court found that the failure of the police to obtain and preserve physical evidence and

to report and record information given to them "colors their credibility in their recollection of the statements upon which they relied as well as that of their informant." The court then determined that the ultimate fact to be found was whether a reasonably competent police officer in the position of the defendants would have submitted these affidavits to the court in the belief that they were accurate and that they established probable cause. The court found that that question should be resolved by a jury and denied the defendants' motion for summary judgment.

3. The Tenth Circuit's Affirmation Of The District Court Order.

The Court of Appeals reviewed the evidence before it *de novo*. Upon review of the record, the Court of Appeals concluded that the District Court properly denied the defendants' motion for summary judgment.

In its opinion, the Court of Appeals reviewed the evidence that had been presented to the district court. The Court found that at the time the defendants drafted the affidavits in question, the law was clearly established that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest or search warrant, if the false statements were material to the finding of probable cause. The Court of Appeals cited *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). The Court of Appeals found that "recklessness" may be inferred from omissions of facts which are "clearly critical" to a finding of probable cause. The Court

of Appeals detailed the plaintiff's evidence and determined that the plaintiff had come forward with specific evidence from which one could infer that the defendants recklessly made false statements in, and omitted material information from, their affidavits. The Court found that the defendant Robinson's statement that Victim #1 had an opportunity to closely observe her assailant was "clearly misleading."

The Court also found that there was circumstantial evidence to create an issue of fact as to whether Victim #1 had actually made the statement to Detective Robinson attributed to her in his affidavit. The Court noted Officer Locke's testimony in his deposition that if Victim #1 had positively identified her assailant, he would have recorded this information. The Court also noted that the failure of the Gunnison Police Department to take any action on this alleged identification until October 24, 1986 was additional circumstantial evidence that Victim #1 did not identify any person in her statement of June 25, 1986. Lastly, the Court found that the omissions from the affidavits directly undermined Victim #1's alleged identification of the plaintiff as her assailant.

In summary, the Court of Appeals found that the defendants failed to make a *prima facie* showing that their conduct was objectively reasonable. The Court found that the plaintiffs had presented direct and specific evidence that the defendants' conduct violated clearly established rights of which a reasonable officer should have known at the time of the drafting of the affidavits. The Tenth Circuit affirmed the ruling of the United States District Court and remanded the action for further proceedings.

II. SUMMARY OF THE ARGUMENT

The Tenth Circuit decision does not conflict with any other case, and follows the established precedent of this Court. The Court of Appeals properly analyzed the issue of qualified immunity and properly found that the evidence in the record supported a finding that the defendant-police officers had violated clearly established law by intentionally and/or recklessly drafting and submitting materially false affidavits. No decision of this Court or any other circuit has held that police officers who submit materially false affidavits are entitled to qualified immunity as a matter of law. Under the facts of the present case, the Tenth Circuit properly ruled that the plaintiff had provided specific evidence that the defendants' conduct violated clearly established rights under the Fourth and Fourteenth Amendments and that a reasonable police officer under the circumstances would have known of the violation. There are no special or important reasons why this Petition for Writ of Certiorari should be granted. Respondent respectfully requests that the writ be denied.

III. ARGUMENT

A. REASONS FOR DENYING THE WRIT

1. The Court Of Appeals Decision Is Consistent With The Rulings Of This Court, Other Circuits, And The Tenth Circuit Which Hold That An Officer Violates A Suspect's Fourth And Fourteenth Amendment Rights By Knowingly Or Recklessly Making A False Statement In An Affidavit In Support Of An Arrest Warrant.

Contrary to the assertions of the petitioner, the holdings of the Court of Appeals is consistent with the ruling of this Court in *Franks v. Delaware*. This Court held that police officers drafting affidavits are constitutionally bound to avoid submitting affidavits containing deliberate falsehoods or which recklessly disregarding the truth. Any law enforcement officer drafting an affidavit at the time the defendants drafted the affidavits in this case, should have known this to be the law. Under the facts in the present case, no reasonably objective police officer could have believed that Victim #1 had actually identified the plaintiff James Bruning as her rapist. In addition, when the defendants inserted this statement in their affidavits, they inserted information which they knew or should have known was false. The Court of Appeals decision is at peace with *Franks v. Delaware*.[3]

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[3] The defendants cite *Anderson v. Creighton*, 483 U.S. 635 (1987) to support a claim that the Tenth Circuit failed to consider the specific circumstances of this case. *Anderson* does require that the court assessing a qualified immunity claim to review the totality of the circumstances. However, reviews of

(Continued on following page)

None of the circuit decisions cited by the petitioners on page 9 of their brief are in conflict with the decision of the Court of Appeals in this case. In none of those decisions was it held that exculpatory evidence available and known to police officers drafting affidavits may be excluded from the affidavits. None of those cases stands for the proposition that a police officer drafting an affidavit may affirmatively assert that a victim has identified a suspect, when the victim has not done so. None of those cases stands for the proposition that police officers may omit from an affidavit the fact that the victim of a crime did not have the opportunity to observe and cannot identify a suspect as her assailant. In fact, most of the cases cited by the defendants on page 9 do not even deal with exculpatory evidence.

The petitioners' assertion that the Court of Appeals reversed *Karr v. Smith*, 774 F.2d 1029, 1032 (10th Cir. 1985) is wrong. In *Karr*, a Section 1983 action against police officers went to trial and the trial court determined by motion for directed verdict that probable cause to arrest the plaintiffs had existed as a matter of law. The Tenth Circuit simply reviewed the facts of the case presented to it and determined that the information available to the arresting officers was sufficient to justify the arrest. There

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the written opinions of the District Court and the Tenth Circuit in this case reveal a detailed analysis of the facts presented to the police officers and the circumstances surrounding the drafting of their affidavits. The Tenth Circuit clearly followed the guidance of *Anderson v. Creighton* in reaching its decision to deny the petitioners' request for qualified immunity.

is nothing in the holding of the Court of Appeals in this case that in anyway contradicts *Karr v. Smith*.

The defendants' assertion that the Court of Appeals decision conflicts with *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985) is also incorrect. *Goodson* is a Section 1983 action involving an arrest. There was no issue concerning the drafting of affidavits in the *Goodson* case. Moreover, contrary to the present case, in *Goodson* it was undisputed that the victim positively identified the plaintiff as the man who had raped her. She was following the plaintiff in a car and pointed him out to the police. Those facts are demonstrably different than the ones presented to the Court of Appeals in the case at bar. There is nothing about the holding in the present case that would in anyway cause confusion on the part of an arresting officer. Officers drafting affidavits in support of arrest warrants are still bound to submit information that is accurate and are not free to recklessly disregard the truth.

Contrary to the assertions of the petitioners, there is no conflict of decisions to be resolved by this Court. The petitioners in this case (and all other police officers) have been provided sufficient guidelines to know when they are acting in conformity with, or violating, a citizen's Fourth Amendment rights in drafting affidavits. *Franks v. Delaware* and the opinion of the Court of Appeals in the present case show the way.[4]

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[4] Petitioners' assertion that the Tenth Circuit ruling "retroactively changes" the standard applicable to police officers in drafting affidavits is also wrong. In *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), the Tenth Circuit reaffirmed that it would

(Continued on following page)

2. The Tenth Circuit's Decision Does Not Conflict With The Decisions Of The Colorado Supreme Court.

Petitioners assert that the Court of Appeals decision somehow conflicts with the decision of *People v. Henry*, 631 P.2d 1122 (Colo. 1981). The petitioners' recitation of that case is incomplete and misleading. As with many of the other citations relied upon by the petitioners, *People v. Henry* has nothing to do with the drafting of affidavits. Moreover, in *People v. Henry*, it was undisputed that the victim had identified the assailant. The Court held that the officers were entitled to rely upon this information "in the absence of any contrary evidence." *People v. Henry*, 631 P.2d at 1127. In the present case, the victim did not identify the plaintiff. It was in this setting that the Court of Appeals held that the police officers are subject to Section 1983 liability for failing to truthfully present this information to the Court.

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be a clearly established violation of a suspect's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause. *Stewart v. Donges*, 915 F.2d at 582-583. Petitioners' reliance upon *Hunter v. Bryant*, 502 U.S. ___, 112 S.Ct. 534 (1991) is also misplaced since this Court noted that in a Section 1983 action against law enforcement officials, the question is whether the officials "acted reasonably under settled law *in the circumstances* . . . ". At 537. This is precisely the standard that was applied by the Court of Appeals in the present case.

3. The Petitioners Misapprehend The Legal Significance Of The Information Omitted From The Subject Affidavits And Consequently Misapprehend Applicable Law.

The petitioners simply fail to acknowledge that the affidavits in question should have stated that Victim #1 could not identify her assailant. Had this information been included, there is no question that the affidavits would not have supported a finding of probable cause. This assertion stands unrefuted in the present record. The affidavits of Rand Hendrickson, the police investigator, and District Attorney Delaney are undisputed. Under the facts in the present case, no reasonable officer would have believed that the victim had identified the plaintiff or that probable cause to arrest the plaintiff existed.

The defendants attempt to manufacture a conflict between the Court of Appeals decision in this case and the Fourth Circuit decision of *U.S. v. Colkley*, 899 F.2d 297 (4th Cir. 1990). There is no such conflict. In *Colkley* (which is not a Section 1983 case), the affidavits in support of the arrest warrant were supported by an informant's account of the crime based upon admissions by the suspect to the informant. This information in and of itself would be sufficient to establish probable cause. The fact the police officers did not include in their affidavits the failure of eyewitnesses to identify the suspect in a photo lineup *would not have vitiated* probable cause. In contrast, in the present case the information affirmatively included in the affidavits, i.e., that Victim #1 had identified the plaintiff as her assailant was false. Moreover, the information omitted from the affidavits, i.e., that Victim #1 could not identify the plaintiff as her assailant *would have vitiated*

probable cause. The decisions of *U.S. v. Colkley* and the Tenth Circuit are consistent in their recognition and affirmation of these principles.

4. Nothing In The Colorado Rule For Non-Testimonial Identification Alleviates The Duty Of Officers To Submit Truthful Affidavits.

Contrary to the assertions of the petitioners, Colorado Criminal Rule of Procedure 41.1 does not relieve police officers drafting affidavits from their responsibilities to submit truthful affidavits. Detective Robinson's claim that the victim "had an opportunity to observe the subject closely" is false under the state rule of criminal procedure, just as it is false under the Fourth Amendment and Fourteenth Amendment. Moreover, nothing about the state rule of criminal procedure alleviates the responsibility of the police officers to avoid violations of a suspect's federal constitutional rights. These issues are sufficiently clear to provide the necessary guidance to police officers in their daily activities.

5. There Is No Split Of Authority On The Question Of Whether The Defense Of Qualified Immunity Is A Question Of Law For The Court - All Circuits Including The Court of Appeals In The Present Case Agree That The Question Of Qualified Immunity Is A Question of Law.

The petitioners attempt to manufacture a conflict in the circuit courts concerning the question of whether a defense of qualified immunity is to be determined by the court as a matter of law. No such split exists. Moreover,

the District Court and the Court of Appeals in the case at bar both expressly recognized and applied the rule that the question of qualified immunity is a question of law for the court.

All of the cases cited by the petitioners recognize this Court's directive in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987) that the question of qualified immunity is to be determined as a matter of law by the court. *Finnegan v. Fountain*, 915 F.2d 817 (2nd Cir. 1990); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985); *Ansley v. Heinrich*, 925 F.2d 1339 (11th Cir. 1991); *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984); *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988); *Gorra v. Hanson*, 880 F.2d 95 (8th Cir. 1989); *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990). Moreover, contrary to the assertions of the petitioners, neither the First, Eighth, or Ninth Circuits holds to the contrary.

B.C.R. Transport Co., Inc., supra, did not arise in the setting of the denial of the summary judgment. Rather, that case involved a trial in which a jury returned a verdict against a police officer. The issue before the jury was not whether the defense of qualified immunity should be upheld, but whether probable cause had existed under the facts and circumstances of the case. Nothing in the First Circuit's holding conflicts with rulings of this Court or any other circuit that it is the role of the court to make the ultimate assessment of a qualified immunity defense.

In *Thorsted, supra*, the Ninth Circuit expressly held that the question of qualified immunity is a question of

law. The Court recognized that where there were factually specific issues to be resolved, a jury must decide them. The Court determined that it was appropriate for the jury to be instructed on the defense of qualified immunity at trial. Nothing in the holding of *Thorsted* conflicts with the holdings of this Court or any other circuit on the question of the role of the court in resolving a qualified immunity defense.

Defendants claim that the Eighth Circuit is internally inconsistent in its rulings citing *Gorra v. Hanson*, 880 F.2d 95 (8th Cir. 1989) and *Morris v. Clifford*, 903 F.2d 574 (8th Cir. 1990). The defendants' position in this regard is incorrect. Both cases intrinsically recognize that the question of qualified immunity is a question of law for the court. In *Gorra*, the court found as a matter of law that reasonable officers could have believed that probable cause existed and therefore, that the summary judgment motion of the defendants should have been granted. In *Morris*, the Court held that where disputed issues of fact exist, those issues must be resolved by the jury. Nothing about these decisions in any way conflicts with the decisions of this Court or any other circuit.

In the present case, the Tenth Circuit reviewed the facts *de novo* and determined that sufficient facts were generated to preclude the granting of qualified immunity as a matter of law. The Court did not rule nor imply that the ultimate decision on the defense of qualified immunity should be referred to the jury. Rather, the Court simply found that the underlying facts were sufficiently in dispute to require resolution by the trier of fact. Nothing about the Tenth Circuit opinion conflicts with any decisions of this Court or other circuits.

IV. CONCLUSION

The Tenth Circuit's opinion in this case conforms with all the rulings of this Court on the application of qualified immunity and is consistent with the decisions of other circuits. The interests of the defendants in being protected from discovery and trial in the event they were entitled to qualified immunity have been protected. The District Court and the Tenth Circuit have determined that the qualified immunity defense is not appropriate and that trial on the merits should proceed. Nothing about this case presents any novel or unique issues that would justify the granting of this writ. For all the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

INTERVIEW

Time:
Date: Oct. 07, 1986
Present: Janice Daily
Det. Sharon O'Connell, Durango Co. P.D.

Ms. Daily: Well I've never, Okay, I've never worked that shift, ever. The lady that used to work it, that shift, had her baby that day was all, that's why they had me work the shift. They had me finish out an 8 hour shift cause nobody else could cause they would be over-time and, and you know, that shit,

Det. O'Connell: Right. Especially now.

Ms. Daily: Yeah. So, they just had me go on and finish out my 8 hour shift. They ask me in the back, there was no one around, the only one was there was Tom Reese and the guy that ask me to work the shift. They were the only ones that basically knew I was gonna work that shift. And then this other girl was up front and she ask if I was gonna work cause they had asked her to work and she couldn't. I said Yeah. And then the one other lady I told I was gonna work and her name is Monica and I don't know what her last name is and I told her 9:00 and I was leaving then. I was coming back. So he could have over-heard it in the line or somethin.

Det. O'Connell: Okay, so there were customers around at that time.

Ms. Daily: Yeah, when I told the girl Monica I was leaving and coming back at 10. But, it didn't seem like

there was that many people around cause I don't broadcast that kind of stuff all the time. You know, and then I got in my car and went home and came back at ten, to finish it out.

Det. O'Connell: Did you lock the car when you left it back in the lot?

Ms. Daily: Yep, it was locked.

Det. O'Connell: Okay. That's a habit of your's so you know for sure?

Ms. Daily: Yeah. I'm positive.

Det. O'Connell: Okay, good.

Ms. Daily: Because I'm from, I moved here from Mankato, Minnesota and I lived in Minneapolis before, it's just a habit. I'm the only person that in Gunnison that probably used to do that.

Det. O'Connell: I know. I lock mine to [sic] but, same thing, I'm from the L.A. area.

Ms. Daily: And you just get used to it. Plus, knowing I was gonna get off that late. And I parked in front. I mean, I didn't park it where we usually have to park on the side. It was parked in *front* of City Market. So, I mean, it wasn't hidden, and there aren't that [p. 2] are on, in the parking lot at night. If you go by there, if you have a chance, just see how dark that parking lot is. It's ridiculous.

Det. O'Connell: Yeah. I'm gonna go to all these at night. During the times, about, after dark anyway to see what the lights are.

Ms. Daily: The lights are just outragiously [sic] bad, at City Market, still. They haven't done anything to improve that. And it pisses me off a lot.

Det. O'Connell: I don't blame you.

Ms. Daily: It really does. And it makes the customers mad and we are, they are loosing business at night. Cause I've had ladies tell me, we think you [sic] store's not even open cause your parking lot is so dark.

Det. O'Connell: Mmmmmmm. Secondly, with this I'm sure they can read the paper, if the Press is anything like it is in Durango.

Ms. Daily: So. . . .

Det. O'Connell: So of course, if especially they're dropping by to shop they don't want to put themselves in the same situation.

Ms. Daily: I get really, I have gone in there probably a couple of times to, since, you know, when I haven't been working to go shop and come out in the parking lot and I'm scared to death. But they don't, they don't ever let me walk out there by myself. But sometimes, I have, cause there's not anybody around, I don't want to be a nuisance. But you have to run to the store to get some stuff, you know, sometimes that stuff happens.

Det. O'Connell: But at the same time you feel the hairs on the back of your neck stand up and . . . .

Ms. Daily: Mmmmm, Oh? MMMMM. They will always do that probably. But so then, about midnight one of the guys came in to the store that was working, it was me and like five other guys. And ah, most of them got off

at midnight. And one of them's car, the plugs had been pulled from his car, you know, so he couldn't start it. He was out there messin around with his car until about 10 minutes before I got off at . . .

Det. O'Connell: Does that car look anything like your car?

Ms. Daily: No. It's a Bug. Blue Bug.

Det. O'Connell: Somebody pulled all the plugs on his car.

Ms. Daily: Yeah. They'd done something to it so it wouldn't start. He thought it was some girl that had worked at the store that was playin a trick on him.

[p. 3] Det. O'Connell: Which it might be but at the same time it's really interesting that it's the same night.

Ms. Daily: I can't imagine that somebody wanted, you know, the guy gets off an eight hour shift the last thing he wants is for his car not to start. But he out messin with his car until about 5-10 minutes before I had to leave. The store. And then when I left the store the one guy, Phil, walked me to my car. And I always have a habit, I can never find my keys in my purse. I, still, to this day I can't. It's always in the bottom. But, he walked me to my car just to be sure I was fine, you know, and then, he knew my car was locked so that he didn't think nothing of it. You know, and I didn't either. So I get in my car and the only thing I could think of is I went to get my cigaretts [sic] out the bottom. So I turned on the light in the car and I was reachin down trying to find my cigaretts [sic],

Det. O'Connell: In the bottom of the car?

Ms. Daily: Yeah. They were on the passenger side. I knew they had fallen when I had gone home or something. I knew they were down there. So I was gettin those out and I must have seen some motion or somethin in the back and that's when I put my hand back there like that and my hands were on his knees. The guy's knees and the light was still on all the time and I thought for some reason, that it was this guy that they'd played the trick on his car? That he was playin a trick on me. And like, "What are you doin in my car?" And then I'm looking at him and I realize I don't know who this person is. And then I'm like, "What *are* you doin in my car?" Who are you, you know, what's going on?

Det. O'Connell: Were you saying these things to him?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: I was talkin to him the whole time cause I thought it was Pat. The guy from work. It wasn't.

Det. O'Connell: Now, when you turned around and looked at him, what did he look like? Right then. What was he wearing, what did his hair look like?

Ms. Daily: He had grey sweat pants on.

Det. O'Connell: Okay.

Ms. Daily: And he had a white handkerchief over his,

Det. O'Connell: That was white!

Ms. Daily: Yeah.

[p. 4] Det. O'Connell: Like a regular linen handkerchief.

Ms. Daily: Regular. . . . handkerchief. He had on, and blue eyes.

Det. O'Connell: Dould [sic] you tell, now did he have, like a mask on and then a scarf over it? Definitely eyes.

Ms. Daily: Definitely eyes, I was looking right into his eyes.

Det. O'Connell: Okay good.

Ms. Daily: And the, he had the receeding [sic] hairline. But I can't tell if it was, I can't remember if it was straight or curly. But I know it was a receeding [sic], he had a darkish, kind of reddish kind of complexion.

Det. O'Connell: You know, like a "ruddy" kind of complexion.

Ms. Daily: Yeah.

Det. O'Connell: Did he have a lot of freckles?

Ms. Daily: Ahuh. Nothin.

Det. O'Connell: Just kind of a red tone to it.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: You know, it, it wasn't ah, it wasn't like a burn or anything, it was a red tone skin.

Det. O'Connell: Do you think it was a blush from when, from going, Oh my God, she's gonna see me. Do you think that could have been part of the look?

Ms. Daily: Yeah. He had fear in his eyes. When I saw him. But I had already locked my door and everything by the time I got in there and,

Det. O'Connell: How was he sitting in the seat, sideways or?

Ms. Daily: No. He was like, yeah, behind my seat.

Det. O'Connell: Okay, let's say this was your seat, okay, and here's the other seat.

Ms. Daily: Okay, he was crouched like this,

Det. O'Connell: Okay, so he was cross-wise of the back seat

Ms. Daily: Yeah

Det. O'Connell: And with his knees pulled up.

[p. 5] Ms. Daily: His knees, well they weren't really pulled up. Cause they weren't, they weren't even level with the seat, you know.

Det. O'Connell: Okay, and then his head was down far enough, below the back?

Ms. Daily: Yeah. Below the car door.

Det. O'Connell: Oh, that far down!

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: So that's how I know he's not that tall and can't be really that big.

Det. O'Connell: What kind of car do you have?

Ms. Daily: Honda Accord.

Det. O'Connell: Yeah, so he can't be real big.

Ms. Daily: But my seat's always pulled way up. Okay, too, so he can't be that big of a person. Like five eight I think is pushin it.

Det. O'Connell: Okay.

Ms. Daily: And I know he probably weights about, built just like the old boyfriend I had, and so I'd say he weighed about 180 cause he's kind a hefty right here.

Det. O'Connell: Kind of fat in the middle, almost like a beer belly?

Ms. Daily: Yeah, kinda. You know, but not that big of a build. He's not that big of a built guy.

Det. O'Connell: Okay, so kind of small boned?

Ms. Daily: Mmmmm.

Det. O'Connell: Okay.

Ms. Daily: But yet, you know, heavy. I mean, not a good build and he had like to me, it was like a blue wind-breaker thing on. Cause that's the noise I remember hearing when he left. Was a slash of that and I remember hearing that in the back seat.

Det. O'Connell: A nylon wind-breaker?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 6] Ms. Daily: You know, just plain.

Det. O'Connell: Now, was the hair, was the hairline receeding [sic] or thinning?

Ms. Daily: Receeding [sic].

Det. O'Connell: Okay.

Ms. Daily: It was like a high forehead.

Det. O'Connell: Okay.

Det. O'Connell: And, almost kind of a reddish tint blond. You know, not, not a white blond. You know.

Det. O'Connell: Kind of like your blond but instead of having brown tones it had reddish tones?

Ms. Daily: Kind of yeah.

Det. O'Connell: Okay.

Ms. Daily: And I'm almost positive blue eyes cause I remember lookin right into those eyes. And all blue eyes really bother me, people with blue eyes.

Det. O'Connell: Are they the icy, clear blue or a, a purply blue?

Ms. Daily: Icy.

Det. O'Connell: Almost like Husky dogs have?

Ms. Daily: Mmmmm..

Det. O'Connell: Okay.

Ms. Daily: And ah, he had a mustache. But I didn't see that.

Det. O'Connell: How could you tell he had a mustache?

Ms. Daily: I felt that.

Det. O'Connell: Oh, okay, later.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then, okay, then he, Okay when I finally realized I didn't know who he was he started yellin at me to turn off the light. You know, he yelled, turn off the damn light! turn off the damn light! You know, so I was really just shaking so I tried to turn it off, I mean. I turned it back on so I mean, so he's like getting up. Okay, but [p. 7] Phil has seen I was in my car and thought I was all right and had already gone back into the store. I was keeping on hoping that he had seen some of this and was gonna come back out. So I got the light off and he was like, get your keys in the ignition and start the car. And I said I'll take you anywhere you want to go or wherever you want to go, just don't hurt me. Okay and by this time he's got the knife up to my neck.

Det. O'Connell: Okay.

Ms. Daily: And he's sayin. Just drive.

Det. O'Connell: Now did he, he swung his feet forward now he's got them on the floor?

Ms. Daily: Yeah. He must have, yeah, cause he had the knife up to my throat before I started driving.

Det. O'Connell: Okay, did he have like, reaching from behind, did he hold on to any part of you with this hand?

Ms. Daily: Yes. He had one hand, he had my collar like this the whole time and the other hand he had the knife.

Det. O'Connell: Okay.

Ms. Daily: And he was sitting down.

Det. O'Connell: Okay, so that's in his right hand.

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: Cause he always had ahold of my collar. I'll never forget that feeling.

Det. O'Connell: Was he pulling your hair to?

Ms. Daily: Yeah, well no, not really, I just had, had on one of those big Coat shirts that have one of those big collars.

Det. O'Connell: Yeah, yeah.

Ms. Daily: And he just like he had a lock on that,

Det. O'Connell: So he just kind of reached up under your hair and then grabbed the collar.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 8] Ms. Daily: Oh yeah, he, he did. He, like yeah. Okay, and then he had the knife and he said, just drive. And then, I have a stick shift and I was like not driving very well you know, and I'm and I explained to him, I go, I'm sorry I'm not driving very well. And, okay, then he just said, he just told me where to drive. And he just said,

just keep going straight and then we just went to that Gunnison Bank and Trust or whatever that Bank is.

Det. O'Connell: Now, when he said, just keep going straight, is, from where you were parked was it straight over to there?

Ms. Daily: No. I had to turn. I mean, just.

Det. O'Connell: So he would tell you turn left or turn right? Or?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ah, then, okay, he took me to that parking lot and he goes, no, pull in the way back. In the dark part. So, I pulled in the way back part. And then I swore to God he said my name. I told him that that night to but I don't know. I could have swore he said "Janice".

Det. O'Connell: Mmmmmmm????

Ms. Daily: But I don't know.

Det. O'Connell: Do you wear a name tag at work?

Ms. Daily: Yeah.

Det. O'Connell: So there's a good chance that he could have.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: But then he asked me my name. He asked me about a boyfriend.

Det. O'Connell: Okay, now are you still in the car?

Ms. Daily: Yeah.

Det. O'Connell: You're still in the car and he's talking?

Ms. Daily: Ahuh. Well, I'm asking him questions. Like, what are you gonna do? You know. I mean. I guess I pretty much knew but I'm like, what are you gonna do? He's like, just shut up! He goe's [sic], do you have a boyfriend? You know, he goes, are you married? I said No. He goes, do you have a boyfriend? I said, No. I figured he was gonna know all this stuff. I mean, I don't know, I didn't wanna lie. I didn't [p. 9] I didn't want to take a chance to lie. So, then ah, he's in the back, now the whole time he won't let me look back. He, he you know, he's got ahold of me like this and he's like taking off his pants. It seems like. Cause he was doing somethin in the back. He was doing something back there.

Det. O'Connell: That was making him shift his weight around?

Ms. Daily: Yeah. Yeah. I know, I'm almost sure he was taking his pants off. But I don't know cause the whole time he was behind me and he won't let me look back. And I wasn't about to look back.

Det. O'Connell: Was he still, where's the knife at this time?

Ms. Daily: It's mostly here, but sometimes he'd take it, he's takin this hand off, you know, and doin things with it and the knife is always up front.

Det. O'Connell: Sometimes he'd take his hand off your collar.

Ms. Daily: Yeah,

Det. O'Connell: and use it to do whatever he was doing.

Ms. Daily: Yeah.

Det. O'Connell: Okay, is he still talking to you while he's shuffling his weight around?

Ms. Daily: Yeah.

Det. O'Connell: What other kinds of things, and if you can remember any quotes?

Ms. Daily: I'll never forget the one quote is, "Are you a nice girl?" "Are you gonna be a nice girl?" "Are you gonna tell anybody about this?" You know, all the time he kept saying, "Are you a nice girl?" And I mean, I'll never forget that. If anyone says I'm a nice girl I'm gonna hit um. Now, but he kept sayin that to me.

Det. O'Connell: He would say, "*Are* you a nice girl?" Or are you going to *Be* a nice girl?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And he'd say ah, let's see, what else was he sayin. Oh, he was askin me where I worked. And I said, Over at City Market. You know,

Det. O'Connell: Did it sound like he was just trying to make conversation with you?

[p. 10] Ms. Daily: Yeah.

Det. O'Connell: Because, obviously, he was watching you from.

Ms. Daily: Yeah, and I didn't tell him the other places I work because I work two jobs. And then ah, what else did he ask me? Oh, then, okay, then, okay, you know, open your door and get out.

Det. O'Connell: When he ask you your name did he ask you for your first *and* last name or just your first name?

Ms. Daily: Just ask for my first name. I never told him my last name.

Det. O'Connell: Okay.

Ms. Daily: And then ah,

Det. O'Connell: So then he told you to open the door,

Ms. Daily: Yeah, and I opened the door and I get out. And then he follows me through the front door. He doesn't go out the back. And then,

Det. O'Connell: How did he get over the seat?

Ms. Daily: It's got a, it's like, it's bucket seats.

Det. O'Connell: Okay.

Ms. Daily: So, then he leaned on the horn and I though, Oh shit! You know, I didn't do it. You know, and he's like, Shut up! And, you know, walk. And then, he had this place all mapped out where we were gonna go, it seemed like, ya know? Cause then he's like tellin me where to walk.

Det. O'Connell: So it was no accident that you just drove up there. You definitely had the idea that this was planned.

Ms. Daily: Yeah. As to where we were going. Yeah. But like in my mind I was thinkin of that Crested Butte thing, he wanted some, I don't know, I'd read in the paper that he had told someone he wanted them to drive to Crested Butte. And I did not want to get in the country with him. At all. So, then he tells me to go back by this fence. It's in the way back of the corner. It's got a bunch of trees and stuff, there's no lights back there. And, what else did he say? there's not that much talkin right now, he's just sayin, You're not goin tell anybody about this are you?

Det. O'Connell: He's still sayin that, he kept repeating that?

Ms. Daily: All the time. Kept sayin that ah, somethin like, I'll make it sound like you wanted to do this. Like it was your idea. He didn't say [p. 11] (cont'd) it like that but he said it in a way that, I'll make it sound like it was your idea. Like, okay. And then, then he ah, he had some twine or somethin, cause that's what he tied up my hands with.

Det. O'Connell: Okay, now, are you standing at this point?

Ms. Daily: No. He has me sit down.

Det. O'Connell: Okay.

Ms. Daily: I sat down facing the fence. The fence corner goes like this.

Det. O'Connell: Okay, so you're looking away from the car?

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: And then ah, he said, he ties up my hands, with the twine, and then takes the ah, thing off of his mouth and put it around my eyes and,

Det. O'Connell: _____?

Ms. Daily: No.

Det. O'Connell: How could you tell he didn't have another handerchief [sic]? Did you sort of see him reaching for this?

Ms. Daily: Yeah. He like, you know, after he tied my hands,

Det. O'Connell: Mmmmmm.

Ms. Daily: Then he took that off. It seems like, cause he didn't have his hand on me. I'm sure it was the same one.

Det. O'Connell: Okay.

Ms. Daily: And then ah, he tied that around my eyes.

Det. O'Connell: Where was he standing. Like you're sitting there, where is he standing?

Ms. Daily: He's on his knees behind me.

Det. O'Connell: Okay.

Ms. Daily: Okay? Behind me. Okay, and I'm like this and he's behind me.

Det. O'Connell: So that's when you could see him reach around like this,

Ms. Daily: Yeah.

[p. 11] [sic] Det. O'Connell: Okay.

Ms. Daily: Okay, so then after he did that, he tied my shoes together. No, he did that after he tied my hands. Cause I know he tied my shoes together.

Det. O'Connell: Take your time.

Ms. Daily: Okay, I'm tryin to think. Okay, no, cause then (cough) okay, after he tied the handerchief [sic] on my eyes, then he, he had me lay down. That's when he took off my pants.

Det. O'Connell: Did he tell you, lie down, or did he just shove you down?

Ms. Daily: No he told me to lie down.

Det. O'Connell: Okay.

Ms. Daily: He, he wasn't real forceful. All the time, you know. I mean, he was, I was scared to say something wrong he might get mad. Cause he got mad at me in the car cause I kept the light on, I didn't mean to.

Det. O'Connell: And that's when he yelled?

Ms. Daily: Mmmmmmm.

Det. O'Connell: So he has you lie down. Oh, let's, let's talk about the cord for a minute. Could you feel what the cord might have been made out of?

Ms. Daily: It was like twine.

Det. O'Connell: Ahmmmmmm,

Ms. Daily: It was thin. I mean, it wasn't, it wasn't rope.

Det. O'Connell: Okay. Could, do you think it could have been ah, piece of leather like a leather shoe lace? Or did it feel more like woven stuff?

Ms. Daily: More like woven.

Det. O'Connell: Okay.

Ms. Daily: Pretty much. And the, then he told me to lay down. And then he ah, like he took off my shoes ___.

Det. O'Connell: What kind of shoes did you have on?

Ms. Daily: I had on tennis shoes. And ah, then he took off my pants.

Det. O'Connell: Was he rough while he was doing this?

[p. 12] Ms. Daily: Ahnnnn. Not while, in this part. And then, ahm, see this is why I don't think he had any pants on cause then, I, I'm, I'm almost sure he didn't. Cause then he started doing some stuff you know.

Det. O'Connell: Did he, now when he started doing this stuff, was, did he try and have you perform some oral sex on him first, while you were lying down?

Ms. Daily: Yes.

Det. O'Connell: Okay.

Ms. Daily: And that's when he got mad at me cause I can't do that. I, I can't, I mean I was too nervous and I was choking. You know.

Det. O'Connell: How was he doing that? Did he have like his knees on your shoulders, was that bruising your shoulders?

Ms. Daily: No, he, no, he just, he had, he was laying on top of me like that, you know, his hands kinda bein up here by the knife, cause the knife was always beside him.

Det. O'Connell: Okay, so he was supporting himself with his hands and having the rest of his body lying on you.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then he got mad at me cause I. . . . couldn't do that.

Det. O'Connell: Did he have an erection at the time he was trying to make you do that?

Ms. Daily: Yeah he did.

Det. O'Connell: Okay.

Ms. Daily: (caugh [sic]) I think yeah. He did. And I was choking. I've never been able to have oral sex. Never. So, I, like I told him, I'm sorry, I just can't.

Det. O'Connell: Okay. But did you turn your head away to be able to talk to him? Okay.

Ms. Daily: And then that kind of made him mad. And he, then he started getting kind of gruff with me.

And he, then he took his knife and ripped open my bra. My shirt was on this whole time. And he just moved my shirt up and he took his knife and ripped open my bra and he started, like having sex . . . with my chest.

Det. O'Connell: He was rubbing his penis up and down between your breasts?

Ms. Daily: Yeah.

Det. O'Connell: Okay, when he was doing that, would he like hold, squeeze your breasts . . .

[p. 13] Ms. Daily: Yeah.

Det. O'Connell: Okay. Now, where was the knife then?

Ms. Daily: He had the knife beside his hand like here, I mean, you know, like almost like here. Instead of down, you know? It was like beside his hand but not in his hand.

Det. O'Connell: Okay,

Ms. Daily: And then ahm,

Det. O'Connell: Could you tell if he ejaculated any, while doing this with your breasts?

Ms. Daily: No. He didn't.

Det. O'Connell: And was this rough now? Like I mean, was he just gently pushing them together or did he just *shove* them hard?

Ms. Daily: No, he was kind of gruff with them and he was like, talkin dirty.

Det. O'Connell: Okay, great! Some of the exact things he said because we need this on profile. If you can remember exact words and if he used dirty words what were they?

Ms. Daily: Well he was just going on and on about my chest. About how much he liked my chest. How he should.

Det. O'Connell: Now what would he say? Would he say breasts or tits or, what, how would he say it?

Ms. Daily: Breasts, he called them breasts.

Det. O'Connell: Breasts! Okay.

Ms. Daily: Never refered [sic] to them as tits. Or anything, he ah, and then like some times, like goin, Oh this feels great. And everything and then, then he moved down. Okay, cause like I didn't have no pants on.

Det. O'Connell: Right. Now when, the thing with the breasts, I still need to know, did he say, would he say things like your breasts are great or your breasts are beautiful or, did he, can you remember exactly what he said?

Ms. Daily: Well he said that, what else did he say. Somethin like, (pause) what did he say. He said I had a nice pair or something, I can't think. You know, what it was. You know. And what was it he said. It wasn't tits.

Det. O'Connell: Boobs maybe?

Ms. Daily: No, it wasn't that. I really can't think of what he said at that time.

[p. 14] Det. O'Connell: Okay, well you might think of it later. But if you can remember, please, call us back and let us know. Because that's another one of those things that's gonna, what words he uses are what he, his brain's thinking.

Ms. Daily: Well, then, then he moved down and ah, made me you know, I don't know, how to say, ah, (sigh) it's like embarassing [sic] you know, cause I didn't enjoy it at all, but like he made me act like I was, tell him I was, you know?

Det. O'Connell: Okay, tell me any of the statements or,

Ms. Daily: Okay, he kept saying, tell me how good I am. Tell me how good it makes you feel.

Det. O'Connell: Okay, and that was the words, "how good I am"?

Ms. Daily: Yeah. And tell me how good it makes you feel. So he was like having me talk to him, like oh you're so good. You know, you make me feel so good. And then he grabbed my hips and he like he was ___ to it, you know, and, it didn't last very long. You know, not very vlong [sic] at all. And then he got mad. Because, I don't know how to explain this, he made me stop, he was making me do this stuff but then he goes, stop, you gotta stop! Stop! He ejaculated.

Det. O'Connell: He's the one moving your hips and then he what, slammed them down or?

Ms. Daily: Yeah.

Det. O'Connell: Mashes you down?

Ms. Daily: He's like, stop, just stop. Cause he was going to. . . .

Det. O'Connell: He was going to come and he didn't want to.

Ms. Daily: Yeah. You know.

Det. O'Connell: Okay.

Ms. Daily: And then, then he was like ahm, he kept sayin to me, well, then when he was doing it he was like, then he started, he did say fuck a couple of times. That. . . .

Det. O'Connell: Was it like, just an expression, "Oh fuck, oh fuck" or did,

Ms. Daily: No, it was like, fuck me, like that, just a couple times. I mean, use abusive language but at times,

Det. O'Connell: When he used "fuck me", was it like he was taling [sic] to himself?

Ms. Daily: Kind of, yeah.

Det. O'Connell: Okay.

[p. 15] Ms. Daily: It wasn't yeah. The only thing he like really said to me during this time was, tell me how good I am, you know, tell me how much you like it. How good I make you feel. And everything. And then, then, he stopped, you know. That, like, don't do that anymore, he told me not do that anymore.

Det. O'Connell: It was kind of like when you stopped talking was because he was getting too much into it. To continue talking and then right after that he wanted you to stop, moving at all.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ahm, then, then it was like over. You know, but then, okay, Then he talked.

Det. O'Connell: Okay, so then he made you, he said, stop. So then, he started moving on his own?

Ms. Daily: Yeah.

Det. O'Connell: Okay, So he's like thrusting and you're not moving.

Ms. Daily: Yeah.

Det. O'Connell: And he's not making your hips move either.

Ms. Daily: No.

Det. O'Connell: Okay.

Ms. Daily: And then, he's like ah,

Det. O'Connell: How long do you think he did the thrusting on his hown [sic]?

Ms. Daily: Not very long. Not too long.

Det. O'Connell: About 2-3 minutes or?

Ms. Daily: Yeah, that'd be about it.

Det. O'Connell: Okay.

Ms. Daily: I mean, the whole didn't even last that long, you know? I mean, it was just like, ah, I don't know. He then, he, okay, he didn't have my shoes tied together cause like, he had me, you know, move my legs _____.

Det. O'Connell: You know, did he tell you, did he, you mentioned in the report that he kind of threw your legs open or spread them kind of rough?

Ms. Daily: Yeah.

[p. 16] Det. O'Connell: Is this when he moved down?

Ms. Daily: When he moved down.

Det. O'Connell: From doing the number with your breasts. And he moved down, so at that point your feet or legs are together.

Ms. Daily: Yeah.

Det. O'Connell: Okay. And then what did he do, did he grab you by the knees or the feet or what?

Ms. Daily: No, it was like by the thighs.

Det. O'Connell: Okay.

Ms. Daily: And he moved them apart. And, then, then he just . . . started.

Det. O'Connell: Okay, now, did he bring any lubricant or did he just kind of "shove it in dry" as it were?

Ms. Daily: Yeah. No, no, there was no foreplay or nothin like that, you know.

Det. O'Connell: Then he didn't bring anything along to help, he just,

Ms. Daily: No.

Det. O'Connell: Shoved it in.

Ms. Daily: Yeah.

Det. O'Connell: On, I know that this is kind of a strange question, but for penis size, was he real small, exceptionally large, mediocre?

Ms. Daily: Probably . . . real small. I mean,

Det. O'Connell: On the small side or?

Ms. Daily: Yeah. It wasn't, I mean it didn't like really hurt me that bad, you know what I mean?

Det. O'Connell: So if it hadn't been dry it wouldn't have been so painful, right.

Ms. Daily: Yeah. Yeah.

Det. O'Connell: So it wasn't that he was exceptionally large.

Ms. Daily: No.

Det. O'Connell: But he still managed to maintain an erection during the time?

Ms. Daily: He did, well, maybe not. Cause he,

Det. O'Connell: See, I'm wondering he maybe he had it up and then lost it and he got it up again. Do you think that might have been the case?

[p. 17] Ms. Daily: Yeah. He did have the erection when he,

Det. O'Connell: When he was doing it with your breasts?

Ms. Daily: Well no, when he was doing . . . oral sex.

Det. O'Connell: Oh, okay.

Ms. Daily: And then during, I don't really know if he did or not, at that time. You know, I wasn't concentrating on, you know, I was just concentrating on him not killing me.

Det. O'Connell: Yeah, it's hard to think of details when you're scared.

Ms. Daily: And then, he did have an erection for awhile. But it wasn't very long. Down, when he was . . . .

Det. O'Connell: Actually during the intercourse?

Ms. Daily: Yeah.

Det. O'Connell: Huh!

Ms. Daily: Because, you know, the minute he made me move my hips, like, lost it, you know. I mean, probably the whole sexual act lasted five minutes. Maybe 10.

Det. O'Connell: And that's from when he was making you move and moving by himself.

Ms. Daily: Yeah. Yeah. And then ah, okay, and then after it was all done, he put my clothes back on me. He put . . .

Det. O'Connell: You're still laying there with your hands tied behind you,

Ms. Daily: Yeah, and he put my underwear on and then he put my pants on and then he put my shoes on and that's when he tied them together. Tied my shoes together.

Det. O'Connell: But he hadn't tied you, your feet prior to that time?

Ms. Daily: No.

Det. O'Connell: And he tied them together after the fact then?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: So I couldn't get up and chase him.

Det. O'Connell: Oh, okay.

Ms. Daily: And then he ah, asked me,

[p. 18] Det. O'Connell: Did he, did he tie one shoe lace to the other shoe lace, is that what he did?

Side two of tape:

Det. O'Connell: Did he point, meaning "this" Bank?

Ms. Daily: And, well no, he didn't, I don't, I don't know cause I couldn't see anything, and I said, you mean here or do you mean at home? And he goes, well either place. And I go, no. I go, I have a hundred dollars in my purse, you can have that. And ah, he went to the car then. He went back to the car. He was back at the car for bout, 5 minutes.

Det. O'Connell: So he was either going through your purse or putting on his pants, or both.

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And then ah, and that's why I was glad I hadn't lied to him cause he could see my name and everything on my license and stuff. And then he came

back and he said, no, if that's all your money I'm not gonna take it. And he said, don't turn around for five minutes. And he goes, don't tell anybody about this cause I'll make it sound like you wanted to do this. And he goes, just be a nice girl. And then he took off runnin behind me, back towards, like City Marker.

Det. O'Connell: Okay.

Ms. Daily: Well he'd untied me, okay? He'd taken the handerchief [sic], he'd untied my hands, but he had my feet tied together. And he said don't turn around cause I'm gonna be watchin you.

Det. O'Connell: Were you sitting then?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

Ms. Daily: And he goes, don't turn around cause I'm gonna be watching, and so I didn't. And ah, said wait five minutes and then you can get in your car and go. I didn't know if he was still in the car or not. You, know,

Det. O'Connell: Good point, he was there the first time, why not now.

Ms. Daily: Yeah. And that's when I went and called my brother-in-law. So . . . .

Det. O'Connell: Can you think of, since you saw his eyes and they were those distinctive kind of icy blue, can you remember a customer coming through, with those eyes?

Ms. Daily: Not that night. It doesn't seem like, well cause, like, most the time I'm not up front. I'm one of those people who has to do everything

[p. 19] Det. O'Connell: You don't run the cash register?

Ms. Daily: No –

Det. O'Connell: The cash registers?

Ms. Daily: No. And I hadn't that time at all. And so, you know, I don't know. There's been a couple people come through that really freaked me out and I told these guys about it,

Det. O'Connell: Mmmmmmmm.

Ms. Daily: But that's been about it. I don't know.

Det. O'Connell: Receeding [sic] hair, and icy blue eyes. Can you remember if his hair was sticking down below?

Ms. Daily: Nnnnnnn . . . All I knew is that he had a mustache at the time and I guess he probably shaved it off. *If it's the same one* with the second woman.

Det. O'Connell: When, was he kissing you during the intercourse?

Ms. Daily: No.

Det. O'Connell: Did, and that's when you noticed the mustache.

Ms. Daily: Mmmm.

Det. O'Connell: Okay, did you notice any odors about him, like, body odor or cigarette smoke or alcohol?

Ms. Daily: There was no alcohol and I could not smell smoke or anything. You know, you can kind of tell, it didn't seem like he was a smoker cause he didn't have that kind of odor, on his breath.

Det. O'Connell: Okay. At the time he kissed you, did he put his tongue in your mouth?

Ms. Daily: Mmmmmm.

Det. O'Connell: Okay, did you notice anything at all, anything strange about his tongue?

Ms. Daily: Nnnnnnnn.

Det. O'Connell: Okay. He did have a mustache, could you notice if his skin was rough or if he, anything else about his skin?

Ms. Daily: I didn't have that much contact with his skin, really.

Det. O'Connell: When he kissed you would he make sure that his face didn't touch yours?

Ms. Daily: No, he kissed kind of, I forgot about that, he kissed kind of gruffly. You know?

[p. 20] Det. O'Connell: Like he was smashing your lips against your teeth, that hard?

Ms. Daily: Yeah. Kind of like, if you kiss harder then I'll kiss back, you know?

Det. O'Connell: Mmmmmm.

Ms. Daily: Like that.

Det. O'Connell: So like if he kissed harder it might make you respond?

Ms. Daily: Right.

Det. O'Connell: Okay.

Ms. Daily: There is a distinct smell that _____but it's something that only hits me every once in awhile. You know what I mean? It's weird kind of a. . . .

Det. O'Connell: Is it a food odor maybe?

Ms. Daily: No, it's kind of out-doorsy kind of, you know.

Det. O'Connell: Smoke maybe?

Ms. Daily: No. You know, how you kind of smell like you've been out-side? That, kind of, okay, kind of like that.

Det. O'Connell: Y . . . e..a..h. Is it kind of a Pine odor maybe?

Ms. Daily: No, I don't know how to explain it. It's not sweat. But, it's like when you've been outside all day, how you kind of smell.

Det. O'Connell: Mmmmmmm. Could it have been a cologne?

Ms. Daily: May be. It could have been. There was a certain smell that every once in awhile I smell it. It kind of bugs me but I can't think what it is.

Det. O'Connell: The next time you smell it concentrate, where is this coming from, what is it, why am I smelling it now, and so on. I mean, it may not even be the same thing but at least if it's close enough you can describe it maybe we can track down what it was. When

he was kissing you with his tongue, was his tongue touching your's? That you could feel? If there was anything strange about it?

No response heard.

Det. O'Connell: Out-doorsy odor. Ahm. Well the next time you hit that one, remember it, and call these guys cause that one is one that I can't figure out.

Ms. Daily: There was, I mean, there was a certain smell about him, but I don't know what it is. I've smelled it a few times since and it freaks me out but I don't know what I contribute it to. You know.

[p. 21] Det. O'Connell: Well, like I said, the next time you do, try and stop and remember what it was. During the time that you were having intercourse, did he want you to put your legs around him?

Ms. Daily: Mmmmm..

Det. O'Connell: Okay, could you tell me about that?

Ms. Daily: He wanted me to put my legs up. You know, about, middle. So that he could get . . . like more thrust_____. I don't know.

Det. O'Connell: When he brought your legs up, could you tell if he was exceptionally hairy? Did he seem to have a lot of hair on his legs?

Ms. Daily: He kind of did. He was not, I mean not massively hairy but more than the average person I'd say.

Det. O'Connell: Okay.

Ms. Daily: I hadn't thought about that.

Det. O'Connell: Now his wind-breaker, he had it on when he came with you from the car.

Ms. Daily: I don't know if he had that on, he didn't have that on either.

Det. O'Connell: When do you think he took thit [sic] off?

Ms. Daily: I think he took that off in the car to.

Det. O'Connell: So he would have gotten out of the car totally naked, do you think?

Ms. Daily: No, he had his shirt on then.

Det. O'Connell: Okay.

Ms. Daily: But it seems to me that he didn't have his on, or maybe he just took off his sweat pants and only had on his truncks [sic] or somethin.

Det. O'Connell: Can you remember, excuse me, can you remember, while you were sitting down, can you remember the sound of him taking clothes off behind you?

Ms. Daily: Nope. He took them off in the car.

Det. O'Connell: Okay.

Ms. Daily: Cause there wasn't time for him to do that, you know, he took them off in the car.

Det. O'Connell: The bandana, was there any odor to the handerchief [sic] at all? As it came past your nose, do you remember?

[p.22] Ms. Daily: Nnnnnn.

Det. O'Connell: Did it smell like starch or like laundry or anything like that?

Ms. Daily: Not that I remember. I just know it was a white one and it had like ahm, like, okay, it's not a straight white one, it had like a . . .

Det. O'Connell: Like a design woven in it?

Ms. Daily: Yeah. A square, you know, like around in a square. you know, like that, just around the edges.

Det. O'Connell: Ahuh, but it was white rather than, usually those are red or yellow or blue or something like.

Ms. Daily: This was white.

Det. O'Connell: This was definitely white. Can you remember what the pattern was that was running around the border?

Ms. Daily: It was just plain, I mean, you know how they can sometimes,

Det. O'Connell: Okay, here you go.

Ms. Daily: It was just a plain pattern. I mean, it was a men's handerchief [sic] so it wasn't lacy, lace.

Det. O'Connell: Okay.

Ms. Daily: Okay, so it was all white you know, except for like, it wasn't as much material right there, you know what I mean?

Det. O'Connell: Oh, okay.

Ms. Daily: That kind.

Det. O'Connell: The kind with the little cut out threads,

Ms. Daily: Yeah.

Det. O'Connell: So that you can see through that part.

Ms. Daily: Yeah.

Det. O'Connell: Okay. But there was not color to it.

Ms. Daily: No.

Det. O'Connell: Okay.

Ms. Daily: And then the knife to, I saw the knife.

[p. 23] Det. O'Connell: Great! Great!

Ms. Daily: I know, they have never figured out what my design on the knife is. But it's like this. Oh I made it too thick. Okay, it's just got a normal round handle, okay,

Det. O'Connell: Okay, was it,

Ms. Daily: It was, this was thick, this was thick. Okay, and then it came up like this, down like this, straight on that side, you know what I mean.

Det. O'Connell: Okay, which was the sharp edge?

Ms. Daily: Right there. This is the sharp edge.

Det. O'Connell: Okay, put me a little arrow for the sharp edge. Okay.

Ms. Daily: That's brown.

Det. O'Connell: Was it shiny wood? Did it have big rivets in it?

Ms. Daily: No. It was like wood.

Det. O'Connell: Just plain old dull wood. Without, I mean like, like the finish had worn off.

Ms. Daily: (can not hear response)

Det. O'Connell: Okay, can you remember if it had rivets in it?

Ms. Daily: Nnnnnn, you mean like, where you hold it you mean?

Det. O'Connell: Ah, no like where they bolt it together.

Ms. Daily: I don't,

Det. O'Connell: It would just be like a shiny spot either silver or brass. Like on a knife handle it will look something like _____here and

Ms. Daily: It had no handles.

Det. O'Connell: Okay, so, it will have like a spot here and a spot here, spot here. Those are rivets that are holding the other side of the handle together.

Ms. Daily: It seemed like they were black.

Det. O'Connell: Black rivets?

Ms. Daily: Yeah.

Det. O'Connell: Okay.

[p. 24] Ms. Daily: It seems like, I'm not real.

Det. O'Connell: When did you have a chance to see the knife?

Ms. Daily: When he brought it up front. Okay,

Det. O'Connell: When the dome light was still on.

Ms. Daily: Well when, I say the knife when the dome light was on and I'm looking back at him. That's when I decided to take him seriously. You know, that this wasn't a joke. And that's when I saw the knife. He had the knife up, you know, in his hand.

Det. O'Connell: And you're sure that that's the sharp side of the knife. Not this side.

Ms. Daily: Yeah, it seems like it. I mean, I can't explain the kind of knife it was. But, no that must have been the sharp side. To be a normal knife.

Det. O'Connell: No, it might not be a normal knife so whatever you remember.

Ms. Daily: It seems like that was the sharp edge.

Det. O'Connell: Okay.

Ms. Daily: But I know that that's the way the blade was.

Det. O'Connell: Okay. For all we know he might have sharpened the back side of it.

Ms. Daily: You, know, yeah.

Det. O'Connell: So it's what you remember that we're interested in.

Ms. Daily: That seems like it was the sharp edge.

Det. O'Connell: Okay. Any thing else at all that you can remember? Cause like seeing the knife was really important.

Ms. Daily: Nnnnnn.

Det. O'Connell: Did he have any trouble putting your clothes back on you?

Ms. Daily: Mmmmmm. Well, he was kind of nervous.

Det. O'Connell: I mean it's like he, what I'm wondering is, has he put women's clothes back on them before? Was he real clumsy or was he fairly much doing pretty good?

Ms. Daily: No, he was doing pretty good.

Det. O'Connell: Okay. Did the handerchief [sic] seem like a nice one? Like fairly light weight material or was it?

[p. 25] Ms. Daily: Mmmmmm.

Det. O'Connell: Okay.

Ms. Daily: It wasn't one of those plain ugly white ones that you can use to _____all the time. You know what I mean?

Det. O'Connell: (chuckle) Yeah!

Ms. Daily: It wasn't one of those.

Det. O'Connell: Okay, so it was a nicer handerchief [sic] .

Ms. Daily: Yeah.

Det. O'Connell: Was there any impression that you had about him at all? I mean this is just a sixth sense impression, on you [sic] own, maybe no basis for it, no

evidence for it, but just something you feel. Have you gotten any of those?

Ms. Daily: What do you mean? I mean,

Det. O'Connell: Like you think this guy is the truck-driver, you think he's a Banker, you think you've seen him.

Ms. Daily: (chuckle) I think he's an auto mechanic.

Det. O'Connell: Okay, how come you get that impression?

Ms. Daily: Cause he just ah, well, no no no, I think he's an auto mechanic because everybody keeps telling me it's this one guy from Standard.

Det. O'Connell: Oh shoot!

Ms. Daily: Well no, I think he's

Det. O'Connell: Did you smell any kind of odors?

Ms. Daily: No. To me he seemed like he was, okay, he just seemed like he was somebody that didn't have a car, for some reason, I felt that, because he was walkin around, you know, so much and everything.

Det. O'Connell: Okay, good!

Ms. Daily: And that he was a,

Det. O'Connell: You mean by walking . . . .

Ms. Daily: I was thinking like he didn't have a job. He was just kind of like "in town". I know that doesn't help you at all but,

Det. O'Connell: No, no you never know this stuff may click through somewhere along the line.

[p. 26] Ms. Daily: He just, he didn't seem like he was, I don't know.

Det. O'Connell: This ah, you say, "cause he walks around a lot" did you say he walks around a lot because he seemed to know the area so well?

Ms. Daily: Yeah. Plus he had sweat pants on.

Det. O'Connell: Like a jogger maybe.

Ms. Daily: Yeah.

Det. O'Connell: Can you remember his shoes at all?

Ms. Daily: Nnnnnnn. I know they were tennis shoes.

Det. O'Connell: Okay.

Ms. Daily: That's it. That's it. I wished I could have seen more.

Det. O'Connell: I think you're doing great for what little bit of looking in the back seat. And that wasn't much time. Are you having nightmares with this?

Ms. Daily: Yeah.

Det. O'Connell: Okay, that [sic] perfectly normal. Your subconscious has got a lot more of this down than your consious [sic] does and when you're dreaming your subconsious [sic] is what's able to bring this stuff up.

Ms. Daily: You know, in my dreams I know the person.

Det. O'Connell: Who, who is it in your dreams?

Ms. Daily: Well in my dreams it's different people each person but I know the person. And Patsy seemed to think that could mean that I do know this person but . . .

Det. O'Connell: But you just haven't focused on the name.

Ms. Daily: But I just don't know him.

Det. O'Connell: I..personally for my own, I think that since you were working on the job, that is highly visible to the public, that yeah, you're going to say one of these times, Oh my God, that's the guy that asked me for the price on the canned yams or that's the guy that asked me for where the such and such.

Ms. Daily: Yeah.

Det. O'Connell: Or what isle [sic] is the frozen foods? And, yeah, your subconscious might be trying to open it up.

Ms. Daily: And that's what really scares me cause I've drempt [sic] that, like I've drempt [sic] that it's my manager at the store, which I know it's not but [p. 27] in my dreams it's you know, or somebody that I've been waitin on out at Tomichi or something but I know it's not these two people but in my dream I know who it is.

Det. O'Connell: It could well be that you will eventually recognize this guy.

Ms. Daily: Well there is one person that gave, I've gave the name to the Police and stuff. It just freaked me out one day when he came in cause I know him, his girlfriend is one of the people I told I was working that night, you know, and,

Det. O'Connell: Does he have receeding [sic] blond hair?

Ms. Daily: Yep.

Det. O'Connell: And the icy blue eyes?

Ms. Daily: Yep. And the build. And everything. And..

Det. O'Connell: You could be right.

Ms. Daily: But it, I mean it botheres [sic] me but I can't even talk to this person anymore. You know.

Det. O'Connell: Yeah. Well that's, even if it isn't him I'm sure he's gonna understand. He's too close to . . .

Ms. Daily: Yeah.

Det. O'Connell: To the real thing, even if it isn't him.

Ms. Daily: _____. I can't pay attention to that.

Det. O'Connell: Well now these dreams that you've got, any, they might trigger a memory of something else like I ask you if his legs were hairy and you said, Oh yeah. So these dreams or flash-backs that you might be getting, may remind you of some other small detail. And PLEASE call back, which, I think you're working with a different Detective, Keith? Is the one you're working with.

Ms. Daily: Yeah.

Det. O'Connell: Call Keith back and, even if he isn't here, leave a message, make sure he gets these little bits and pieces because it's like puttin a jigsaw puzzle

together, nobody walks in with the whole jigsaw puzzle and hands it to us. Each one is gonna come in with little pieces of it. And even if it's something that sounds real irrelevant, like a remark he made or, or maybe he looks off to the west and says, Oh so and so's lights are out tonight, anything, just any little thing.

Ms. Daily: Well, like that other girl, that he got and stuff, was he more brutal or anything?

[p. 28] Det. O'Connell: No. No, there's a lot of similarities. A lot of similarities.

Ms. Daily: See, I just can't imagine why, what, what he's doing. I'm just,

Det. O'Connell: I wish I could.

Ms. Daily: You know,

Det. O'Connell: I wish I could do that, to.

Ms. Daily: Cause the only thing I want to ask him when he gets caught, and I do want to ask him this, cause it'll bug me the rest of my life. Is, why? Why me, why did you pick me?

Det. O'Connell: It could be.

Ms. Daily: That's all I want to know.

Det. O'Connell: It could be general description. That's the ONE thing that we've got going, so far, is general description. And that could be all there is to it.

Ms. Daily: Yeah. I don't know.

Det. O'Connell: Well, if anything clicks through, or somebody clicks through or a face hits you, but what

you've given us is great. I mean the receeding [sic] hair and the icy blue eyes.

Ms. Daily: It's not much.

Det. O'Connell: And the slightly reddish tint to the hair. You, you're doing great.

Ms. Daily: I don't know. They haven't caught him so I'm not doin that good.

Det. O'Connell: Well, he's no dummy, he's been clever in what he's doing. Like not letting you see him and unfortunately, since we have the ability to see, we let a lot of our other capabilities slip by. We don't pay so much attention to what we hear, what we smell and what feel. So once you deprive someone of their sight, he's got a real advantage.

Ms. Daily: I guess. But I tried to get picked up on the way home. You know what I mean. Like I went 90 miles an hour cause I didn't want to go to the Police and, cause I was really scared cause he said, what did he say, he told me not to go to the Police cause, well because he would make it sound like I,

Det. O'Connell: Like the whole thing was your idea.

Ms. Daily: And also, he didn't say he'd come and get me, but it was like inferred the fact that, you know, like he knew where I worked.

Det. O'Connell: Well you know that already.

[p. 29] Ms. Daily: Yeah.

Det. O'Connell: Okay. You could believe it for sure.

Ms. Daily: Yeah. I know, _____ a lot of stuff cause it's been four months.

Det. O'Connell: Well make notes when you remember something. Put it in a note in your purse. I mean, I can't even remember everything I want to tell my mother on the telephone so I start with the list. So just make little one or two or three word notes to yourself and then you can, when you get in here and talk to Keith then you can start elaborating on what those few words remind you of. And also, once you start using that part of your memory, it gets used more, then more stuff will start coming through.

Ms. Daily: Well I was gonna go to a hypnotist and like try to have them draw a picture of what I did see cause subconsciously you kind of block out things sometimes,

Det. O'Connell: Well check with Keith cause sometimes testimony that was gained under hynosis [sic],

Ms. Daily: They say they can't do that.

Det. O'Connell: Right. That is not admissible in Court so we, even though it might help us catch the guy, we'd end up not being able to prosecute him and that would be just as frustrating.

Ms. Daily: Well, Okay, if they do catch him, like they were sayin, that maybe they will get him on one count or try to get all of them or what, what?

Det. O'Connell: Well if we can put these little tidbits together that match, that we can tie them together, and we can. Let's say that we can get him on your's but we

can't get him on the others, then if we can show the similarities on your's then we can tie those others in.

Ms. Daily: MMMMM.

Det. O'Connell: So that's why we are SO desperate to get exactly what he said, exactly what he did, how rough, on and on.

Ms. Daily: Yeah.

Det. O'Connell: But with you, the only thing that made him mad was when you didn't get the dome light off, right away.

Ms. Daily: And when I couldn't do oral sex.

Det. O'Connell: But other than that he wasn't mad or real rough.

Ms. Daily: No.

Det. O'Connell: Did he try to perform oral sex on you?

Ms. Daily: No.

[p. 30] Det. O'Connell: Okay. Well, I can't think of anything else right now. But like I said, if you do, cause something else is lible [sic] to come up. On, on with, on your something, at first they'll be just small things and then it'll be more of them. And even if you can't remember. God did I tell them that or not, call in and tell them again. We'd rather hear it twice than not at all.

Ms. Daily: Yeah. I know I just feel like I don't want them to think I'm little paranoid freak that keeps calling them. They, ok, this is . . . . ya know.

Det. O'Connell: Well there's a difference if you keep calling, have you caught him, have you caught him, I'm having nighmares [sic], that's one thing. Where if you call them and say, Hey I think I remember one more thing about such and such. That is helpful, that's definitely helpful. The other one, yeah, sounds a little paranoid but on the other hand you've got a right to be scared. You're still don't know who he is.

Ms. Daily: No.

Det. O'Connell: And I'm glad to hear, really glad to hear that you've got a counselor cause that will help you to.

Ms. Daily: Well if he just does it one more time I have to leave, I can't take it any more.

Det. O'Connell: Well, if you DO leave, please keep Keith informed of where you went.

Ms. Daily: Yeah.

Det. O'Connell: Cause he'll keep it away from the Press, keep it away from everybody but at the same time if we do happen to nail this guy then we can bring you back with the possibility of tying him in.

Ms. Daily: Yeah. Cause that's the only thing that really bothers me. I can read about rapes and everything like that and it doesn't bother me but to know the same guy is out raping other women, bothers me.

Det. O'Connell: Well that's why I appreciate you coming in and going through all of this, which I know has got to be very unpleasant for you. But the information,

that's exactly what we're trying to do there. Is this guy, catch him somehwere [sic] else.

Ms. Daily: Well, he's kind of scary now that he's goin into homes.

Det. O'Connell: Yeah.

Ms. Daily: That's just too much.

End of tape.

Transcribed by: Shirley A. Spitzmiller
Gunnison Police Dept.

APPENDIX 2

IN THE COUNTY COURT
IN AND FOR THE COUNTY OF GUNNISON
AND STATE OF COLORADO
Action No.

THE PEOPLE OF THE STATE OF COLORADO CONCERNING JAMES A. BRUNING	)))))	AFFIDAVIT FOR ORDER FOR NONTESTIMONIAL IDENTIFICATION

I, Detective Keith Robinson, being First duly sworn, upon my oath state that I have reason to believe:

(1) There is probable cause to believe an offense has been committed, Sexual Assault in the first degree, C.R.S. 1973, 18-3-402 (F-2), in Gunnison County, Colorado on June 17, 1986 at approximately 1 AM as Janice Dailey was leaving her place of employment, City Market, which is located in the City and County of Gunnison, Ms. Dailey entered her locked maroon Honda Accord, and while sitting on the driver's seat she turned on the car's dome light and discovered a male subject in the back seat. Ms. Dailey had an opportunity to observe the subject closely. The subject threatened Ms. Dailey with a knife, ordered her to turn off the light, and ordered her to drive to a nearby bank parking lot where he ordered her out of the car and did sexually assault her, threatening her with a knife. During this attack he did blindfold her, and did bind her wrists. He ordered her to "tell me that you like it", also questioning her about boyfriends, and admiring her body. After the assault, Ms. Dailey contacted the

police, reporting the crime and describing the perpetrator as a white male in his twenties having receding brownish-blond hair, blue eyes, and wearing a blue nylon windbreaker and gray sweatpants.

(2) On or about June 25, 1986 Ms. Dailey was working at City Market, when she observed a party known to her as "Jim" enter City Market. Ms. Dailey greeted him and observed he quickly turned away from her without responding. She then noticed that he was wearing a blue nylon windbreaker and gray sweatpants. She also noticed this person had identical hair color and style and eyes as the person who had sexually assaulted her. Ms. Dailey reported that at this time, she "knew it was him", meaning the person who had sexually assaulted her.

(3) Ms. Dailey reported that "Jim" is the boyfriend of Monica Gustafson, who she is acquainted with, and has met "Jim" on three occasions socially and was told that he worked at AJ Upholstery in Gunnison.

(4) On 09-05-86, Susan LeHardy reported that at approximately 12:30 AM, as she slept on her sofa, a male party unknown to her entered her residence, 505 West Virginia, which was then and is now located in the City and County of Gunnison, and sexually assaulted her at knifepoint. During this assault, in which the victim was blindfolded and bound at the wrists, the suspect instructed her to say to him "tell me you want me to fuck you", and also questioned her about her boyfriend, and admired her body. In this attack, the knife was described as a utility knife.

(5) On 10-24-86, your affiant met with victim, Janice Dailey, who reported that she had been reluctant to come

forward and inform the police about her identification of the suspect because Monica is a friend. Through investigation, your affiant learned that "Jim", the boyfriend of Monica Gustafson, is James A. Bruning, DOB 08-03-52, one of the owners of AJ's Upholstery. Your affiant knows that linoleum knives and utility knives are common tools in the upholstery trade.

(6) With the above listed information, your affiant believes that there are reasonable grounds to suspect that James A. Bruning committed these offenses.

(7) Serological examination of blood and saliva samples can establish a relationship to the semen samples collected in the investigation. The victims can identify the voice of the perpetrator. Hair samples can be compared to hair samples collected at the scenes of the crimes. One victim reported an anomaly on the end of the suspect's tongue, and one victim can identify the facial feature of the suspect. Fingerprints can be compared to the latent prints collected at the scene, and used to identify the person.

(8) The results of the following specific non-testimonial identification procedures:

(a) Blood sample;

(b) Saliva sample;

(c) Voice sample;

(d) Hair sample;

(e) Photographs of person (including tongue); and

(f) Fingerprints

will be of material aid in determining whether the person named in this affidavit committed the offense.

The undersigned affiant hereby requests that a non-testimonial identification order in accordance with the grounds and facts herein set forth.

Dated this 24th day of October, 1986.

/s/ Keith Robinson
Affiant

Subscribed and sworn to before me this 24th day of October, 1986.

/s/ A. Reese
County Court Judge

APPENDIX 3

COUNTY COURT, COUNTY OF GUNNISON, STATE OF COLORADO

CASE NUMBER

AFFIDAVIT

THE PEOPLE OF THE STATE OF COLORADO,

vs.

JAMES ALLEN BRUNING, Defendant.

In support of a request for the issuance of a warrant for the arrest of JAMES ALLEN BRUNING, the undersigned affiant, being first duly sworn, deposes and says:

1. I am a police officer in and for the City of Gunnison, Colorado and as such have the responsibility for investigation of crimes therein.

2. On June 17, 1986 Janice Dailey reported to Officer Keehne of the Gunnison Police Department that she had been raped. Ms. Dailey reported to Officer Keehne that on June 17, 1986 at approximately 1:00 AM she left work at City Market, located at 400 West Virginia Avenue, Gunnison, Gunnison County, Colorado, and got into her car which was parked in the City Market parking lot. Ms. Dailey stated that when she got into her car she turned on the dome light and discovered a person in the rear seat. She described the person as a white male, slim to medium build, average height, with straight blond hair, mustache, and sweat pants. She reported that the subject threatened her with a knife, ordered her to turn off the light, and directed her to drive to Columbia Savings and

Loan, located at 200 North Spruce Street, Gunnison, Gunnison County, Colorado, where he ordered her out of the car and to a nearby dark area where he forced her to engage in sexual intercourse with him.

2. [sic] In subsequent interviews with Det. Locke, Gunnison Police Department, and Det. O'Connell, Durango Police Department, Janice Dailey described the suspect as having blond hair, receding or thinning in the front, blue eyes, a mustache, a reddish complexion, and wearing a blue nylon windbreaker-type jacket, gray sweat pants, and a white handkerchief over his mouth and nose. She also reported that the suspect had an unusual odor about him, kind of outdoorsy, and that he had hairy legs.

3. In an interview with Det. Robinson, on 10-24-86 Gunnison Police Department, following up on earlier remarks made by Ms. Dailey, Ms. Dailey stated she had seen the person who sexually assaulted her several days later while she was working in City Market. She reported that "Jim", the boyfriend of Monica Gustafson, an acquaintance, had entered the store and that when she greeted him he looked away without responding. She then noticed that he was wearing a blue nylon windbreaker, gray sweat pants, and that he had blond hair that was receding and blue eyes. She reported that she then suddenly realized that he was the person who sexually assaulted her on June 17, 1986. She reported that she immediately became very excited and unable to continue work, calling for someone to take her place for the remainder of the day.

4. Janice Dailey reported further that she recalled that Monica Gustafson had been in City Market the evening before the assault and that Ms. Gustafson was the only person other than store employees she told about working late that night. Ms. Dailey stated that "Jim" was Ms. Gustafson's boyfriend and that he worked at AJ's Upholstery. She also advised that Ms. Gustafson works for Western State College.

5. Sgt. Ferguson, Gunnison Police Department, contacted Robert Goodnough, Western State College Business Office, and asked if he was acquainted with Monica Gustafson and if he knew her boyfriend. Mr. Goodnough advised he knew Ms. Gustafson and called back to report that her boyfriend was Jim Bruning who owns AJ's Upholstery. Police Department records revealed that James A. Bruning is a co-owner of AJ's Upholstery.

6. On September 5, 1986 Susan LeHardy reported to Off. Ryan, Gunnison Police Department, that she had been sexually assaulted in her residence at 505 West Virginia Avenue, Gunnison, Gunnison County, Colorado. Ms. Lehardy reported that she had been asleep in her house at approximately 12:30 AM when she was attacked by a male subject who held a knife to her throat, blindfolded her, and forced her to engage in sexual intercourse with him.

7. In subsequent interviews with Off. Ryan and Det. O'Connell Ms. LeHardy described the suspect as having hairy legs, an unusual odor about his person, and having a very distinctive feature or scar on his tongue. She also reported that she believed he was wearing a nylon windbreaker type jacket, possibly velcro tennis shoes, and

she noticed that he carefully avoided touching her face with his, other than mouth to mouth contact.

8. On October 24, 1986 Det. Robinson requested and received an order for non-testimonial identification pursuant to Rule 41.1 of the Colorado Rules of Criminal Procedure ordering James Allen Bruning to provide blood, saliva, and hair specimens, fingerprints, to allow photographs of his person and his tongue, and to permit a recording of his voice. The order was carried out on October 27, 1986 with the specified identification material collected by the appropriate authority.

9. Sgt. Ferguson observed an unusual feature, possibly a scar, on Mr. Bruning's tongue which appear in the photographs taken by him. Off. Ryan transported the blood and saliva specimens to the Colorado Bureau of Investigation laboratory for examination. On October 29, 1986 lab examiner Cathy Baker reported by telephone that James A. Bruning could not be excluded as a suspect in the above described sexual assaults based upon her serological examination. Other laboratory examinations are pending.

10. I am not aware of any other facts which would tend to exculpate James Allen Bruning.

/s/ J. Steward Ferguson
Affiant

Subscribed and sworn to before me this 28th day of October 1986.

/s/ A. Reese
JUDGE

I have read the foregoing affidavit, and I find that there is probable cause to issue a warrant for the arrest of James Allen Bruning on the charges of Sexual Assault in the First Degree, Second Degree Kidnapping, First Degree Sexual Assault, and First Degree Burglary.

/s/ A. Reese
JUDGE

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,

Plaintiff,

vs.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWARD FERGUSON,

Defendants.

AFFIDAVIT OF PAT DELANEY

State of Colorado)
) ss.
County of Otero)

I, Pat Delaney, state under oath as follows:

1. I am currently a Chief Deputy District Attorney in the Sixteenth Judicial District. I have been a Prosecuting Attorney for almost eleven years.

2. I was an Assistant District Attorney for the Seventh Judicial District, which includes Gunnison, Colorado, from March, 1985 to March 1987.

3. On December 8, 1986, I was advised by Reid Pixler, the District Attorney for the Seventh Judicial District, that I was to assist Joseph S. Pacyga, a young deputy district attorney, in handling a preliminary hearing in the criminal case of *People of The State of Colorado vs. James Allen Bruning*, case number 86F. Mr. Bruning had been charged with committing two sexual assaults, one on Janice Dailey on June 17, 1986.

4. On the evening of December 10, 1986, I reviewed the file in preparation for the preliminary hearing which was scheduled for December 11, 1986. The file was in an extremely disorganized condition. I spent most of this time trying to organize it.

5. On December 11, 1986, I discovered that there were a number of materials that were not included in the "file" that I had been provided by Mr. Pixler. Specifically, I determined that a number of Colorado Bureau of Investigation laboratory reports and analyses of evidence were not included in this file. At that time, I spoke with Deputy District Attorney Pacyga and advised him that he would have to gather all of the material related to the case and provide it to defense counsel.

6. On December 11, 1986, Attorney Michael Stern, who was representing the victim Janice Dailey, approached me and stated "Pat, is there anything we can do about this?" Mr. Stern indicated to me that statements had been attributed to his client, Janice Dailey, that were not true. Mr. Stern indicated that these statements appeared in police affidavits. Mr. Stern said that these statements indicated that Janice Dailey had positively identified James Bruning as the rapist. Mr. Stern again

indicated that was not true. Mr. Stern advised me that at his insistence, a meeting was scheduled between Janice Dailey and himself and Mr. Pixler and Mr. Pacyga. It is my understanding that that meeting took place on October 30, 1986. Mr. Stern told me he had brought the discrepancies to the attention of Reid Pixler, Joseph Pacyga, and J. Steward Ferguson, the Gunnison police officer primarily responsible for the investigation of these crimes. Mr. Stern advised me that Janice Dailey had disavowed the statements in the affidavits in the presence of Mr. Pixler and Mr. Pacyga. This was the first time that I had been aware that there was any question concerning the veracity of the affidavits.

7. It was the routine procedure in the District Attorney's Office that one of the lawyers draft the affidavits. The affidavits filed in the Bruning case would probably have been typed in the District Attorney's Office. It was also the responsibility of a lawyer in the District Attorney's to review the underlying factual basis for the affidavits. Ninety-five percent of the affidavits that I was aware of were drafted by lawyers in the District Attorney's Office of the Seventh Judicial District. A typical procedure was that the police officer would bring the district attorney a report and the district attorney would then prepare the affidavit. I believe that Mr. Pacyga indicated to me that he had drafted the affidavits in the Bruning case.

8. At the December 11, 1986 preliminary hearing, I determined that the case was a house of cards built completely on the foundation of a positive identification by Janice Dailey. Without that identification, I felt the

case had no merit. It had become apparent that that identification was not going to come about.

9. On December 11, 1986, I spoke with J. Steward Ferguson. This conversation took place after the first day of the preliminary hearing. During this conversation, Officer Ferguson indicated to me that he believed that the case should be dismissed and that he anticipated a civil lawsuit as a result of the case.

10. I called a meeting for December 16, 1986 in which I requested the presence of Mr. Pixler, Mr. Pacyga and Officer Ferguson. At that meeting, I recommended that the case be dropped. I made that recommendation on three bases. First, that even in light of the cursory standard to establish probable cause, I did not believe we had sufficient evidence to establish probable cause at the preliminary hearing (even under Judge Reese's notoriously low standard for probable cause). Secondly, even if we were to fortuitously succeed in establishing probable cause, after hearing the evidence I believed there was a substantial possibility that James Bruning was not the rapist. Thirdly, I suggested to Mr. Pixler that the case was similar to the *Higgs* case in that we were subjecting ourselves to the possibility of a strong civil suit. I suggested that we dismiss the case at that time in an attempt to minimize our civil liability exposure. Notwithstanding my previous discussion with Officer Ferguson on December 11, 1986, at this meeting, Officer Ferguson advised Mr. Pixler by telephone that in his opinion we should go through with this case and follow it through to the bitter end. I later confronted Officer Ferguson and asked him why he had told me one thing on December 11, 1986 and

Mr. Pixler another on December 16, 1986. Officer Ferguson responded that his supervisor, Police Chief Yates, had advised him that the suit should be pursued in order to minimize exposure to civil liability. During this meeting on December 16, 1986, Mr. Pixler determined that the prosecution of this action would continue through preliminary hearing, contrary to my advice.

11. At the preliminary hearing of January 22, 1987, I discovered for the first time that Officer J. Steward Ferguson had not provided the District Attorney's Office with any exculpatory material concerning the investigation of James Bruning.

12. In my opinion, as an experienced prosecutor, I did not feel that there was sufficient evidence to bind the case over for trial. Moreover, had the affidavits of the police officer properly reflected the nature and extent of Janice Dailey's testimony, I would never have filed this case.

13. It is my opinion that one of the central reasons that the case was not dismissed following the first preliminary hearing was due to political considerations, i.e., the District Attorney's Office and the police department would have been subjected to public criticism in the event the case was dismissed at that time.

14. As an experienced prosecutor, I basically work under a presumption of guilt. The Bruning case is the only time I can recall sitting in a courtroom listening to a case and suddenly realizing that "We may have the wrong guy." Not only did we not have enough evidence to convict beyond a reasonable doubt, I personally had a reasonable doubt that Mr. Bruning was guilty.

Further the affiant sayeth not.

/s/ Patrick Delaney
Pat Delaney

Subscribed and sworn to before me this 9th day of November, 1988.

My commission expires: My Commission Expires Aug. 19, 1990

/s/ Catherine Irene Miller
Notary Public

Otero County Courthouse
LaJunta, Colorado 81050
Address

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-1600

JAMES BRUNING,

Plaintiff,

vs.

REID C. PIXLER, individually and in his official capacity as District Attorney for the Seventh Judicial District and JOSEPH S. PACYGA, individually and in his official capacity as Deputy District Attorney for the Seventh Judicial District, DISTRICT ATTORNEYS OFFICE FOR THE STATE OF COLORADO'S SEVENTH JUDICIAL DISTRICT, FLOYD JOHNSON, individually and in his official capacity as Chief of the Gunnison Police Department, CITY OF GUNNISON POLICE DEPARTMENT, JAMES ROBERT KEEHNE, RUSSELL LOCKE, ROBERT G. RYAN, KEITH ROBINSON, and J. STEWARD FERGUSON,

Defendants.

AFFIDAVIT OF RAND B. HENDRICKSON

State of Colorado)
) ss.
County of Jefferson)

I, Rand B. Hendrickson, state under oath as follows:

1. I am formerly the Chief Investigator of the District Attorneys Office for the Second Judicial District of the State of Colorado. Prior to my appointment as Chief Investigator, I served as a police officer for the City and

County of Denver and my various assignments included an assignment with the Sex Offense Unit of the Denver Police Department.

2. In my career as a Police Officer, I have been responsible for or participated in the investigation of over 2,000 complaints assigned to the Sex Offense Unit of the Denver Police Department. In my capacity as a Police Officer, I have drafted numerous, but in no event, less than 100 affidavits in support of: arrest warrants, search warrants and orders for nontestimonial identification. I have been qualified in the Courts of Colorado as an expert while in law enforcement and since leaving law enforcement in the field of investigative procedure, specifically procedures relating to the investigation of sexual offenses.

3. In January of 1988, I was contacted by Mr. Daniel Reilly, Attorney at Law, and presented, then and subsequently, with hundreds of pages of discovery provided by the District Attorney and law enforcement in the Seventh Judicial District and preliminary hearing transcripts, depositions and deposition summaries.

4. I was subsequently requested to review the affidavit in support of the issuance of an arrest warrant for James Allen Bruning and render an opinion based upon my background, training and experience in the field of law enforcement as to whether or not the information contained therein, constituted probable cause from the vantage point of what a reasonable police officer would know and understand probable cause to be. Relying solely on the four corners of the affidavit to make this determination and relying upon the information therein

as being truthful or at least honestly believed by the affiant at the time of the signing of the affidavit and considering it in the light most favorable to law enforcement, it is my opinion that there does exist sufficient information within the affidavit to support the issuance of an arrest warrant.

5. However, the only material evidence in the affidavit linking James Allen Bruning to the offenses enumerated in the affidavit is the alleged identification of Bruning by one of the victims, Janice Dailey. Without this alleged identification, the four corners of the affidavit would not support a finding of probable cause for the arrest of James Allen Bruning.

6. The probable cause contained in the affidavit rests squarely on the identification by Janice Dailey of James Allen Bruning as being the person who assaulted her. However, this identification was reportedly made on or about June 25, 1986 at the Gunnison Police Department, no record of any sort was made of this alleged identification until October 24, 1986 at which time officers of the Gunnison Police Department were in the process of preparing affidavits for nontestimonial identification and affidavits in support of a search warrant. It was during this process that the first reference was made of the alleged identification of Bruning by Dailey.

7. The affidavit also seems to ignore the fact that Janice Dailey was interviewed in depth on October 7, 1986 by Sharon O'Connell of the Durango Police Department and that interview was tape recorded and transcribed. In that interview, Dailey stated "There's been a couple of people come through (referring to her place of

employment) that really freaked me out . . . ", she further went on to say very specifically that " . . . I just don't know him (referring to her assailant)".

8. Considering the fact that the alleged identification of Bruning, by Dailey, was never recorded and that the subsequent interview of Dailey by Detective O'Connell which was recorded and specifically asserts her inability to make any identification and Dailey's denial that she ever positively identified Bruning as her assailant, casts real doubt as to the veracity of the statement by officers that Janice Dailey made a positive identification of James Allen Bruning, on or about June 25, 1986. If in fact an identification had been made at that time the failure of police officers to record and act on it would constitute a degree of incompentance [sic] that I have rarely if ever seen in my experiences in professional law enforcement.

9. Considering therefore the unbelievability of the alleged identification made on June 25th, coupling it with the statements which are totally in opposition to that identification contained in the transcript of Janice Dailey on October 7th. It would in my opinion lead a [sic] objective and reasonable person to conclude that the report authored by Officer Robinson on October 24, 1986 to be little more than a transparent attempt to manufacture necessary information to be included in an affidavit so that such affidavit would reach a level of probable cause necessary to support the issuance of an arrest warrant.

10. It is therefore my opinion that the information relied upon by the affiant in the preparation of the

affidavit for issuance of an arrest warrant was so obviously contraindicated as to the positive identification of Bruning by Dailey, that to include it in the affidavit without qualification or explanation constitutes a deviation from what an objective and reasonable police officer would consider appropriate in like circumstances.

Further the affiant sayeth not.

/s/ Rand B. Hendrickson
Rand B. Hendrickson

Subscribed and sworn to before me this 10th day of November, 1988.

My commission expires: My Commission Expires 09-30-91

/s/ Erika Swanson
Notary Public

5275 Marshall #106
Address Arvade, CO 80002